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Office of Administrative Law Judges
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Issue Date: 22 July 2004

Case No: 2000-BLA-498

In the Matter of

JIMMIE D. BUCHANAN,

Claimant

v.

RAG AMERICAN COAL COMPANY

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER ON REMAND - AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment. 30 U.S.C. § 902(b).

Claimant filed an initial claim for benefits on July 29, 1993, which was denied by an administrative law judge on June 25, 1996. Claimant filed a second claim for benefits on August 27, 1998. Benefits were awarded in that duplicate claim by my Decision and Order of May 20, 2002.

On appeal by Employer, the decision was affirmed in part, vacated in part, and remanded to the Office of Administrative Law Judges by Decision and Order of the Benefits Review Board (Board), BRB No. 02-0648 BLA, issued August 29, 2003.

Claimant filed a motion for extension for the filing of briefs on January 13, 2004. That motion is granted. Employer submitted its brief on January 13, 2004. Claimant submitted his brief on January 22, 2004. Employer submitted a reply brief on February 9, 2004 with a request that it be accepted into the record. Claimant has voiced no objections. Employer's request is granted.

The findings of fact and conclusions of law stated in the prior Decision and Order are adopted herein except to the extent that they were found to be erroneous by the Board, or to the extent that they are inconsistent with the findings and conclusions made in this Decision and Order on Remand.

Remand Order of the Benefits Review Board

The Board affirmed my finding of twenty years of qualifying coal mine employment and my findings that the evidence was insufficient to establish pneumoconiosis under Sections 718.202(a)(1) through (3). In addition, the Board held that the standard set forth in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997), was the correct standard to employ when determining whether a material change has been established in a duplicate claim brought within the jurisdiction of the Seventh Federal Circuit. On appeal, Employer argued that while clinical pneumoconiosis may progress, that legal pneumoconiosis is not progressive. The Board disagreed with this contention, holding that the case law and regulations recognize that pneumoconiosis, clinical or legal, is a progressive disease.

The Board, did however, vacate my finding of pneumoconiosis under Section 718.202(a)(4). In the prior Decision, I found that Claimant had established a material change in condition by demonstrating the existence of pneumoconiosis under Section 718.202(a)(4). Since the basis for the finding was vacated,

the Board also vacated my finding of a material change in condition pursuant to Section 725.309(d). The Board also vacated my finding that Claimant had established that his total disability was due to pneumoconiosis under Section 718.203(c). Finally, the Board directed that I address whether Claimant's entitlement to benefits is precluded by a preexisting totally disabling impairment in accordance with *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994).

In its Decision, the Board ordered the following:

1. To address whether Claimant's entitlement to benefits is precluded by a preexisting totally disabling impairment in accordance with *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994).

2. To address whether the evidence is sufficient to establish either clinical or legal pneumoconiosis under Section 718.202(a)(4);

3. To reconsider Dr. William C. Houser's medical opinion and his status as a treating physician in evaluating the evidence under Section 718.202(a)(4);

4. To explain how Dr. Houser's more recent physical examination of Claimant provided him with an advantage over the other physicians of record.

5. To reconsider the opinions of Dr. Robert A. C. Cohen and Dr. David Hinkamp in evaluating the evidence under Section 718.202(a)(4);

6. To explain the finding that the opinions of Drs. Gregory J. Fino, Joseph J. Renn and Peter G. Tuteur were not in accord with prevailing medical and scientific literature and to determine whether, and to what extent, the hostile opinion affected the physician's medical diagnoses;

7. To reconsider whether Claimant has established a material change in condition pursuant to Section 725.309(d); and

8. To reconsider whether the evidence is sufficient to establish that Claimant's total disability is

due to pneumoconiosis pursuant to Section 718.204(c).

DISCUSSION AND APPLICABLE LAW

Vigna Analysis[1]

In *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), the Seventh Federal Circuit held that a claimant's entitlement to benefits can be precluded if the record establishes that his total disability was caused by a preexisting medical condition other than a coal dust induced disease. In *Vigna*, the medical evidence established that the claimant had suffered a totally disabling stroke in 1971. *Vigna*, 22 F.3d at 1390. The claimant filed a claim for black lung benefits two years after suffering this disabling stroke. *Id.* Physicians assessed the claimant's respiratory and pulmonary condition throughout the adjudication of the claim and he was found to have a respiratory impairment. *Id.* at 1391. The claimant was awarded benefits and the employer appealed. The Seventh Circuit held that the claimant was disabled in 1971 and that "the evidence undoubtedly evinces that Vigna's pneumoconiosis or his employment at Peabody was not a necessary cause or an event which contributed to Vigna's total disability on June 2, 1971." *Id.* at 1394. Thus, the court held that the claimant was unable to demonstrate that his total disability was caused by pneumoconiosis and was precluded from entitlement to benefits.

In this case, Employer contends that Claimant's degenerative disc disease is the cause of his total disability and that entitlement to benefits should be precluded under *Vigna* as a result. Claimant argues that the medical evidence does not demonstrate that he has a totally disabling back condition.

The record reveals that Mr. Buchanan first had back surgery in 1989. (DX 34). Mr. Buchanan continued coal mine employment until 1993. Therefore, Mr. Buchanan cannot be considered to have had a totally disabling back condition prior to 1993.

[1] The Seventh Circuit recently addressed the *Vigna* holding in *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486 (7th Cir. 2004). The court held that *Vigna* applies only to claims brought under Part 727 of the Act regarding evidence of disabling non-pulmonary or non-respiratory impairments. *Id.* at 495.

Dr. John Mealey, Jr. authored a report on January 22, 1992 finding that Claimant was capable of returning to his former coal mine employment after back surgery and physical therapy. (EX 10). Physical therapists Angela K. Black and Jeanene A. Goebel evaluated Claimant for his ability to return to coal mine employment. (DX 34). Ms. Black and Ms. Goebel determined that Mr. Buchanan was capable of work at a "medium physical demand level" and was "able to return to work with noted restrictions." Dr. Steven A. Rupert issued an October 28, 1992 medical assessment of Claimant's back condition. (DX 34). Dr. Rupert determined that Mr. Buchanan had 12% whole person impairment from his low back injury. He stated that Claimant was able to perform "medium-type work," being able to lift weights up to fifty pounds. Dr. Rupert also noted that his assessment of Claimant's impairment did not "take pulmonary deficits into account."

Dr. William C. Houser issued a medical report on March 26, 1992 in which he noted that Claimant suffered from severe chronic obstructive pulmonary disease (COPD), but did not comment on Claimant's ability to engage in coal mine employment. (DX 21). On March 11, 1993, Dr. Houser submitted a medical report to Employer noting that Mr. Buchanan was totally disabled as of March 9, 1993 due to COPD, chronic bronchitis and degenerative disc disease. (DX 21). Dr. Houser noted that Claimant's capacity for lifting, carrying, standing and walking was limited by both his COPD and back condition, and that his capacity for sitting for long periods of time was limited by his back condition. Dr. Houser's 1993 medical report is the earliest evidence of record making a determination that Claimant is totally disabled. Dr. Houser stated that both COPD and degenerative disc disease were responsible for Claimant's total disability. The record contains no prior evidence evincing that Claimant's back condition was totally disabling alone prior to the development of Claimant's disabling respiratory impairment. Furthermore, subsequent medical narrative reports reveal that Claimant is totally disabled due to his respiratory condition and his back condition. In sum, the record contains no evidence demonstrating that Claimant had a totally disabling non-respiratory, non-compensable preexisting condition that would preclude his entitlement to benefits pursuant to the holding in *Vigna*.

Duplicate Claim

Claimant's previous claim for benefits was denied on July 18, 1997. As a result, the claim involved in this proceeding,

filed on August 27, 1998, constitutes a "duplicate claim" under the regulations. The provisions of Section 725.309(d) apply to duplicate claims and are intended to provide relief from the traditional notions of *res judicata*. Under Section 725.309(d), duplicate claims "must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in condition." 20 C.F.R. § 725.309(d). The United States courts of appeals have developed divergent standards to determine whether "a material change in condition" has occurred. Because Claimant last worked as a coal miner in the state of Indiana, the law as interpreted by the United States Court of Appeals for the Seventh Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Under the Seventh Circuit's standard for establishing a material change in condition, a claimant "must show that something making a difference has changed" since the prior final denial. *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997). Thus, "a claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial", and "[h]is theory of recovery on the new claim must be consistent with the assumption that the original denial was correct." *Id.* In applying this standard, the administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether it establishes at least one of the elements of entitlement that formed the basis for the prior denial. If the new evidence establishes the existence of one of these elements, it will demonstrate a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Id.* at 1008-09. *See Lisa Lee Mines v. Director*, OWCP, 86 F.3d 1358, 1363 (4th Cir. 1996); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994).

In the denial of Claimant's prior claim, the administrative law judge determined that the evidence failed to establish pneumoconiosis. If the newly-submitted evidence establishes this element, it will demonstrate a material change in condition. *Spese*, 117 F.3d at 1008. Then, I must review the entire record to determine entitlement to benefits. *Id.*

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30

U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. Although the x-ray evidence does not establish pneumoconiosis, a physician's reasoned opinion nevertheless may support the presence of the disease if it is explained by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986).

The record contains numerous reports and treatment records from Dr. Houser spanning a period of eight years from 1992 to 2000. Dr. Houser's most recent medical report was issued on November 6, 2000. (CX 3). Dr. Houser diagnosed Claimant with coal workers' pneumoconiosis, COPD and chronic bronchitis. Dr. Houser based his diagnosis of coal workers' pneumoconiosis, clinical pneumoconiosis, on the positive chest x-rays of record and Claimant's history of coal dust exposure. A diagnosis of pneumoconiosis based on a positive chest x-ray and history of dust exposure alone is not a well documented and reasoned opinion. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000). Therefore, I cannot credit Dr. Houser's diagnosis of clinical pneumoconiosis. Dr. Houser based his diagnosis of COPD on examination findings and the results of the pulmonary function and arterial blood gas studies. He attributed Claimant's lung disease to both cigarette smoking and coal dust exposure. In support of his determination, Dr. Houser referred to medical studies demonstrating that coal dust exposure can cause an obstructive impairment in the absence of clinical pneumoconiosis. Dr. Houser's opinion takes into consideration treatment, examinations and objective pulmonary testing performed since the date of the previous denial. I find his opinion to be well documented and reasoned and entitled to full weight. Dr. Houser is board-certified in Internal Medicine and Pulmonary Disease, entitling his opinion to additional weight. Furthermore, I assign Dr. Houser's opinion substantial weight as

a treating physician. Treating physician opinions are entitled to greater weight if there is a valid medical reason for doing so. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69 (7th Cir. 2001). However, familiarity with the patient is insufficient by itself to entitle a physician's opinion to greater weight. *Id.* at 470. An administrative law judge should not mechanically assign greater weight to treating physicians. *Id.* at 469; *see also National Mining Association v. Department of Labor*, 292 F.3d 849, 862 (D.C. Cir. 2002). Although treating physicians are not automatically entitled to greater weight, I find that Dr. Houser's opinion is deserving of substantial weight. He is a pulmonary specialist, his opinion is well documented, reasoned and persuasive, and his report reflects his treatment of Claimant's pulmonary condition from 1992 to 2000.

Dr. Houser is also the physician of record to have most recently examined the Claimant. Although this can be a factor in assigning greater weight to a physician's opinion, I do not assign additional weight to Dr. Houser's opinion on that basis. Other physicians examined Claimant within the same period of time or reviewed the examination reports of physicians who recently examined Claimant. I find that Dr. Houser's examination is not separated by a significant period of time entitling his opinion to greater weight on that basis.

David Hinkamp, M.D., diagnosed Claimant with COPD caused by smoking and coal dust exposure. (EX 4). He based his diagnosis on the patient's history, pulmonary function studies, arterial blood gas studies and epidemiological studies. Dr. Hinkamp noted that Mr. Buchanan quit coal mining and smoking close in time and that "[t]here is no basis for concluding in this case that either smoking or coal dust exposure is more likely than the other" as the etiology of Claimant's condition. He supported this statement with a review of medical literature. I find Dr. Hinkamp's opinion to be well documented and reasoned and entitled to full weight. Dr. Hinkamp is board-certified in General Preventative Medicine and Occupational Medicine.

Dr. Robert A. C. Cohen issued two well documented and reasoned medical reports regarding Claimant's respiratory condition. He diagnosed Claimant with legal pneumoconiosis in the form of COPD. He opined that Claimant's COPD was caused by a combination of coal dust exposure and smoking. He based this diagnosis on Claimant's history of coal dust exposure and smoking, examination findings, and the results of the pulmonary function and arterial blood gas studies. Dr. Cohen reviewed the pertinent medical literature finding that coal dust exposure

produces obstructive respiratory impairments. I find Dr. Cohen's opinion to be thorough, detailed, and persuasive. In addition, I find his opinion to be well documented and reasoned. As Dr. Cohen is a pulmonary specialist with a wealth of knowledge and experience in the treatment of pneumoconiosis, I assign his opinion additional weight.

Dr. Reynaldo Carandang diagnosed Claimant with COPD due to smoking and coal dust exposure. He based this opinion on Claimant's symptoms, history of coal dust exposure and smoking, radiological findings, and the results of the pulmonary function and arterial blood gas studies. He also cited to medical literature to support his opinion that coal dust exposure can cause COPD and reviewed Dr. Cohen's narrative report. I find Dr. Carandang's opinion to be well documented and reasoned and entitled to full weight.

Dr. Fino diagnosed Claimant with COPD due solely to smoking. He explained that Claimant's obstructive defect is demonstrated in the small airways, which is indicative of a smoking-induced lung disease. Dr. Fino stated that although medical studies have shown that coal dust exposure can cause obstruction that the studies do not suggest that coal dust exposure causes significant obstruction. In addition, Dr. Fino reviewed and criticized various studies that analyzed coal dust exposure and obstructive lung disease. He discredited the majority of the studies due to "selection bias." (EX 4). The Department of Labor disagreed with Dr. Fino when it addressed many of these studies and Dr. Fino's viewpoint in the December 20, 2000 Amendments to the Act. 65 Fed. Reg. 79939-79942 (Dec. 20, 2000). Therefore, as the foundations of Dr. Fino's opinion diverge from what the Department of Labor has found acceptable, I find Dr. Fino's opinion to be not well reasoned and assign it less weight. Although Dr. Fino is a pulmonary specialist, I do not assign additional weight to his opinion as it is not well reasoned.

Dr. Joseph Renn diagnosed Claimant with chronic bronchitis and emphysema due solely to smoking. Dr. Renn allows for the possibility that coal dust exposure can cause an obstructive respiratory impairment; therefore, I find his opinion is not hostile to the Act. Dr. Renn stated that coal dust exposure played no role in the development of Claimant's respiratory condition; however, he does not explain how he arrived at that conclusion. Although he lists the medical evidence he reviewed and explains the results of the objective testing in the record, Dr. Renn does not discuss how the medical evidence supports his

conclusion. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982). As Dr. Renn does not provide the basis for excluding coal dust exposure as a possible cause of Claimant's respiratory condition, I find his exclusion of that cause to be a basis for discrediting his opinion. As such, I assign his opinion less weight. Although Dr. Renn is a pulmonary specialist, I do not assign additional weight to his opinion on that basis as his opinion has been discredited.

Dr. Tuteur diagnosed Claimant with COPD due solely to smoking. He explained that an impairment in gas exchange, as shown by the arterial blood gas studies, five years after leaving coal mine employment makes the contribution of coal dust exposure to his lung disease less likely. Dr. Tuteur opined that examination findings were not consistent with a diagnosis of pneumoconiosis. He disagreed with the conclusions of Drs. Cohen and Hinkamp and stated that their opinions relied on critically flawed medical studies. As Dr. Tuteur allows for the possibility that coal dust exposure can cause obstructive impairments, I do not find his opinion to be hostile to the Act. However, Dr. Tuteur expresses views in this opinion divergent from those accepted by the Department of Labor. Dr. Tuteur's opinion suggests that a coal dust induced obstructive impairment cannot progress after the cessation of coal dust exposure. This view conflicts with that accepted by the Department of Labor. 65 Fed. Reg. 79940 (Dec. 20, 2000). I find that the foundations of Dr. Tuteur's opinion are divergent from those accepted by the Department of Labor. For this reason, I find his opinion to be not well reasoned and I assign it less weight. Although Dr. Tuteur is a pulmonary specialist, I do not assign his opinion additional weight as it is not a well-reasoned opinion.

In sum, I find the opinions of Drs. Cohen, Hinkamp, Houser and Carandang to be well documented and reasoned. I assign substantial weight to the well-documented and reasoned opinion of Dr. Houser as Claimant's treating physician for the reasons discussed above. Dr. Cohen's substantial experience in pulmonary medicine, as shown by his current positions and appointments in the pulmonology field and his focus on coal workers' pneumoconiosis, entitles his opinion to additional

weight. Although Drs. Fino, Renn and Tuteur also possess board-certifications in Internal Medicine and Pulmonary Medicine, I have found their opinions to be poorly reasoned and assign them less weight. I find that the opinions of Drs. Cohen, Hinkamp, Houser and Carandang outweigh those of Drs. Fino, Renn and Tuteur. Consequently, the record supports a finding of pneumoconiosis under Section 718.202(a)(4).

Claimant has established that he suffers from legal pneumoconiosis under Section 718.202(a)(4). As a result, Claimant has established the element of entitlement previously adjudicated against him and has shown a material change in condition pursuant to Section 725.309(d). Therefore, I must review the entire record to determine Claimant's entitlement to benefits.

Full Record Review: Pneumoconiosis and Causation

Claimant has established the existence of pneumoconiosis under Section 718.202(a)(4), as discussed above. Once pneumoconiosis has been established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

I have found that Claimant was a coal miner for twenty years, and that he had pneumoconiosis. Claimant is entitled to the presumption that his pneumoconiosis arose out of his employment in the coal mines. No physician opining as to the presence of pneumoconiosis offers an alternative cause to rebut this presumption. See, *Smith v. Director, OWCP,* 12 BLR 1-156 (1989). Therefore, I find that Claimant's pneumoconiosis arose from his coal mine employment.

Full Review of Record: Total Disability Causation

That Claimant suffers a totally disabling respiratory impairment was not contested on appeal and had been established in the prior claim. However, the Board instructed that I reconsider whether Claimant has established that his respiratory impairment is due to pneumoconiosis under Section 718.204(c).

Claimant must establish that his total disability is due to pneumoconiosis. 20 C.F.R. § 718.204(c). To satisfy this requirement, the United States Court of Appeals for the Seventh Circuit requires pneumoconiosis to be a "contributing cause" of total disability. *Compton v. Inland Steel Co.*, 933 F.2d 477, 480 (7th Cir. 1991). Under this standard, coal mining "must be a necessary, but need not be a sufficient condition of the miner's total disability." *Id.* See also, *Shelton v. Director, OWCP,* 899 F.2d 690, 693 (7th Cir. 1990). Thus, where the miner's pulmonary disability has multiple causes, such as coal dust exposure and cigarette smoking, "the miner does not collect black lung benefits if he would have been unable to work even had he never been exposed to coal dust." *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 838 (7th Cir. 1994). Although pneumoconiosis must be a "necessary" condition of a miner's total disability, the "concurrence of two sufficient disabling medical causes, one within the ambit of the Act, and the other not, will in no way prevent a miner from claiming benefits." *Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 363 (7th Cir. 1985); See also *Foster*, 30 F.3d at 838; *Mitchell v. Director, OWCP*, 25 F.3d 500, 506 (7th Cir. 1994); *Hawkins v. Director, OWCP*, 907 F.2d 697, 704 (7th Cir. 1990).

Applying Seventh Circuit case law, I must determine whether Claimant's total disability from a respiratory standpoint is due to pneumoconiosis arising out of his coal mine employment. If so, he is entitled to benefits. If not, all of his disabling conditions must be considered, including his non-respiratory conditions, to determine whether coal mining is necessary to his disability. Under this second inquiry, an award of benefits would be precluded if Claimant would have been totally disabled notwithstanding his previous coal mine employment. See *Foster*, 30 F.3d at 839; *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 1395 (7th Cir. 1994).

The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that the miner was totally disabled are more reliable for assessing the etiology of the miner's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995).

Drs. Cohen, Houser, Hinkamp and Carandang, opined that Claimant's respiratory impairment is due to a combination of coal dust exposure and smoking. I continue to find their opinions to be well documented and reasoned on this issue. Drs.

Fino, Renn and Tuteur opined that Claimant's respiratory impairment is due solely to smoking. As discussed above, I find their opinions to be poorly reasoned. Dr. Renn provides no explanation for ruling out coal dust exposure as a possible cause for Claimant's impairment. Drs. Fino and Tuteur based their opinions, in part, on a critical review of medical literature. Their opinions are divergent from that of the Department of Labor and are thus entitled to less weight.

In sum, I find that the opinions of Drs. Cohen, Houser, Hinkamp and Carandang are the better-reasoned opinions of record. I conclude that they outweigh the poorly reasoned opinions of Drs. Fino, Renn and Tuteur. Therefore, I find that Claimant has demonstrated that pneumoconiosis due to coal dust exposure is a contributing cause of his totally disabling respiratory impairment.

Claimant has established that he has pneumoconiosis, that it arose of out coal mine employment, and that he has a totally disabling respiratory impairment arising out of coal mine employment. As a result, Claimant is entitled to benefits.

ENTITLEMENT

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month during which the claim was filed. 20 C.F.R. § 725.503(b). Based upon my review of the record, I cannot determine the month that Claimant became totally disabled due to pneumoconiosis. Consequently, Claimant shall receive benefits commencing August 1, 1998, the month during which this claim was filed.

A miner's award of benefits should be augmented on behalf of a dependent spouse or child who meets the conditions of relationship pursuant to Section 725.210. For the miner's benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and a dependency test.

ATTORNEY'S FEES

An award of attorney's fees for services to the Claimant has not been made in this Decision since no application has been filed by counsel. Claimant's counsel will have fifteen (15) days from the date of receipt of a final Order following the

exhaustion of all appeals within which to submit a legal fee application. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The other parties will have fifteen (15) days following the mailing date of the application within which to file objections. If no response is received within this fifteen day period, the parties will be deemed to have waived all objections to the fee requested.

In preparing the attorney fee schedule, the attention of counsel is directed to the provisions of §§725.365 and 725.366. In conjunction with each of those regulations and in considering applicable case law, IT IS ORDERED that the fee petition filed in this case shall include each of the following:

1. A complete statement of the extent and character of each separate service performed shown by date of performance;

2. An indication of the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing each quantum of work and that person's customary billing rate;

3. A statement showing the basis for the hourly rate being charged by each individual responsible for the rendering of services;

4. A statement as to the attorney or other lay representative's experience and expertise in the area of Black Lung law;

5. A listing of reasonable unreimbursed expenses, including travel expenses; and

6. A description of any fee requested, charged or received for services rendered to the Claimant before any State or Federal Court or Agency in connection with a related matter.

ORDER

The Employer, Rag American Coal Company, is ordered to pay the following:

1. To Claimant, all benefits to which he is entitled under the Act, commencing August 1, 1998;

2. To Claimant, all medical and hospitalization benefits to which he is entitled commencing August 1, 1998, or otherwise provide for such services; and

3. To Claimant, interest at the rate established by Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty days from the date of the initial determination of entitlement to benefits. 20 C.F.R. § 725.608.

A

Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, ATTN: Clerk of the Board, P. O. Box 37601, Room S-5220, 200 Constitution Avenue, N.W. Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.